

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

RSA No. 1379 of 2007

DATE OF DECISION: .5.2007

Naroti Dass

...Appellant

VERSUS

Smt.Phul Kaur and others

...Respondents

CORAM

HON'BLE MR.JUSTICE PERMOD KOHLI

PRESENT: Mr.Vijay Kumar Jindal, Advocate for appellant

Permod Kohli,J.

This Regular Second Appeal arises out of the judgment dated 29.3.2007 passed by the Additional District Judge, Karnal in Civil Appeal No.64 of 2005. Briefly stated the facts as emerged from pleadings of the parties are that the appellant herein is son of one Tek Chand whereas respondents no.1 to 4 are the legal representatives of Hukam Chand. Respondent no.5 is also widow of Tek Chand and is the mother of the appellant. It is admitted case of the parties that Hukum Chand and Tek Chand were real brothers being sons of one Ram Parshad. Suit property i.e. House No.8/1018 situated in Sadar Bazaar,

Ambedkar Nagar, Karnal was mortgaged by Ram Parshad to one Nathu Ram son of Kalu Ram for an amount of Rs.1500/- on 1.5.1964, which was further mortgaged vide registered deed dated 18.7.1964 registered on 22.7.1964 with one Kishori Lal son of Nathu Ram for Rs.800/-. Though the property was mortgaged, the possession remained with Ram Parshad as a tenant thereof. The case of the appellant is that he redeemed the suit property by paying the mortgage money to the mortgagees and has thus acquired absolute title over the property. Respondents no.1 to 4 filed a suit for partition before the trial court claiming themselves to be the co-owners of the property. The suit was resisted by the appellant merely on the ground that property was redeemed by him without any contribution from Hukum Chand and his legal representatives. The trial court framed as many as six issues. However the relevant issue is issue no.1 which reads as under:-

“1.Whether the plaintiffs are entitled to a preliminary decree for possession by way of partition of the house in dispute, if yes to what effect? OPP.”

After the trial, the suit of the respondents was decreed and a preliminary decree for possession by way of partition by metes and bounds has been passed for $\frac{1}{2}$ share in the suit property. The trial court returned a finding that Hukum Chand and Tek Chand were joint owners and the mortgage money was paid by both of them at the time of redemption of the property. Aggrieved of the judgment and decree of the trial court, the appellant herein

preferred appeal being Civil Appeal No.64 of 2005 before the Additional District Judge, Karnal. The Appellate Court, while concurring with the judgment and the conclusion of the trial court in passing the preliminary decree for possession by way of partition only modified the findings of the trial court to the extent that the mortgage money was exclusively paid by Tek Chand at the time of the redemption of the property. On the basis of these findings judgments and decrees of the courts below have been assailed in this appeal.

It is contended on behalf of the appellant that the suit filed by the respondents was barred by time. According to the learned counsel, the limitation for filing such a suit is three years under Article 113 of the Limitation Act, 1963. According to the learned counsel, Tek Chand had become mortgagee in possession after the redemption of the property on payment of the mortgage money, and therefore, the legal representatives of Hukum Chand could only seek redemption of the property and not the partition.

I have heard the learned counsel for the appellant and perused the paper-book.

This appeal is liable to be dismissed solely on the ground that there is a concurrent finding of fact as regards the relationship of the parties. Both the courts below have concurrently held that Hukum Chand and Tek Chand were real brothers and were co-owners of the suit property. The trial court held that the mortgage money was paid by both the parties i.e. Hukum Chand and Tek Chand, though these findings have been

reversed by the first Appellate Court by holding that the mortgage money was paid only by Tek Chand. Be that as it may, the mutual relationship of the parties continues to be that of co-sharers. Even if it is accepted that Tek Chand, one of the co-sharers got the property redeemed by paying the entire mortgage money, this redemption is only for the benefit of all the co-sharers and not for his exclusive benefit. By no stretch of imagination, it can be assumed that the one co-sharer, by securing the redemption of the property on payment of mortgage money becomes the mortgagee. The moment the property is redeemed, mortgage ceases to exist. Thus, there is no question of the mortgagor becoming the mortgagee in respect of share of other co-sharers, after the entire property was got redeemed from the mortgagee. Particularly, when the co-sharers were in possession of the property, even before its redemption.

As far as the question of limitation is concerned, learned counsel for the appellant, has not been able to point out any specific provision of Limitation Act which is applicable for filing the suit for partition by co-sharers where all the co-sharers are in possession of joint property. He has taken shelter under Article 113 of the Limitation Act which is only residuary provision and will not be attracted in the present case. Apart from above, no such plea of limitation was ever raised before the courts below. The appellant has also placed reliance upon a judgment of the Apex Court rendered in the case of **Krishna Pillai Rajesekharan Nair (D) by L.Rs. v. Padmanabha Pillai**

(D) by L.Rs. and others (AIR 2004 Supreme Court 1206), to argue that residuary Article applies in a suit for partition when the right to sue accrues. In the aforesaid case, the suit for partition was preferred by the assignee of the non-redeeming co-mortgagor by seeking a declaration of title with recovery of possession and in the alternative the relief of partition. It was in this context that the Apex Court has referred to the question of limitation. The facts of the present case are totally different. In the present case, the mortgagors who are also the co-owners of the suit property were in possession of the suit property, even at the time of redemption and thereafter. In the present case, there is no question of bar of limitation. Right to sue for partition is continuing right. Even in the judgment rendered in the case of Krishna Pillai Rajesekharan Nair (D) by L.Rs. (supra), the Apex Court has observed as under:-

“21..... The co-mortgagor can be a co-owner too.

A property subject to mortgage is available as between co-mortgagors for partition, of course, subject to adjustment for the burden on the property.

One of the co-mortgagors, by redeeming the mortgage in its entirety, cannot claim a right higher than what he otherwise had faced with a claim for partition by the other co-owner. He cannot defeat the legal claim for partition though he can insist on the exercise of such legal right claimed by the other co-owner-cum-mortgagor being made subject to the

exercise of the equitable right vesting in him by subrogation.” (Emphasis supplied)

In view of the aforesaid observations of the Apex Court and the concurrent findings of fact recorded by the courts below, I do not find any merit in this appeal. This appeal is dismissed. No order as to costs.

(PERMOD KOHLI)
JUDGE

.5.2007
MFK

NOTE: Whether to be referred to the Reporter or not: YES